

STATE OF MICHIGAN  
COURT OF APPEALS

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BAC HOME LOANS SERVICING, LP,

Plaintiff/Counter-  
Defendant/Appellee,

v

YOLANDA THOMAS,

Defendant/Counter-  
Plaintiff/Appellant,

and

LOUISE COLEMAN, THE ESTATE OF  
GENEVA THOMAS,

Defendants

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UNPUBLISHED

August 13, 2013

No. 309601

Macomb Circuit Court

LC No. 2010-004262-CH

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I do not agree with the majority's treatment of the purchase money mortgage doctrine, but concur in the result of this case because I find no error in the trial court's alternative basis for its ruling.

The purchase mortgage doctrine provides that property purchased with a mortgage is transferred to the mortgagor already encumbered. However, a purchase money mortgage cannot encumber the interests of those other than the mortgagor. In this case, the face of the warranty deed executed at the closing transferred ownership from seller MGD Building Co to Geneva Thomas, Yolanda Thomas and Louise Thomas as tenants in common. Therefore, pursuant to the deed itself, each of the three owned an equal one-third undivided share of the property.

Neither Yolanda nor Louise Thomas entered into a mortgage as relates to their respective one-third interests in the property. Geneva Thomas did enter in such a mortgage.

As Geneva Thomas' mortgage was a purchase money mortgage, the mortgage attached itself to the property received by Geneva Thomas at the time of closing and so is superior to any lien obtained thereafter, even if recorded first. *Fecteau v Fries*, 253 Mich 51; 234 NW 113

(1931). However, as noted in *Fecteau*, the “[purchase money mortgage] attaches to such interest as the mortgagor acquires” (citing *United States v Railroad*, 12 Wall. (U.S.) 362). Accordingly, the mortgage provided to BAC by Geneva Thomas would take precedence over subsequently created liens, but it could not attach itself to property that Geneva Thomas did not own. The deed as written gave her a one-third interest in the property and so the mortgage could only attach to that one-third interest. Thus, if the deed were enforced as written, BAC would be entitled to foreclose on that one-third interest and, if it chose to, seek a sale or division of the real property.

The majority reviews the overwhelming evidence that inclusion of Yolanda Thomas and Louise Thomas on the warranty deed was a mutual mistake of BAC and Geneva Thomas. Given that evidence, I find no clear error in the trial court’s reformation of the warranty deed to show that Geneva Thomas was the sole purchaser of the property and had a 100% interest in it. However, the fact that the deed should be reformed in equity does not mean that the unreformed deed can encompass more than what is on the face of the document. The deed as written, therefore, cannot create a lien on the property owned by Yolanda or Louise Thomas, neither of whom ever applied for nor entered into a mortgage.

/s/ Douglas B. Shapiro